***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

76-1040

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P/S

# United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,
*Appellee.*

-against-

WILLIAM FIGUEROA,
*Appellant.*

*On Appeal From The United States District Court For The Southern District of New York*

# Appellant's Brief



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U.S.A.

Appellee

-against-

WILLIAM FIGUEROA,

Appellant.

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## APPELLANT'S BRIEF

## ISSUES PRESENTED

1. Whether the notice given to counsel of the Government's intention to elicit proof of acts not charged in the indictment was so inadequate that it denied appellant a fair trial?

2. Whether the use of a co-conspirator's post conspiracy statements inculpating appellant was plain error?

## PRELIMINARY STATEMENT

Appellant, WILLIAM FIGUEROA, appeals from a judgment rendered against him in the United States District Court for the Southern District of New York, on January 15, 1976, convicting him, after a trial by jury, of the crimes of conspiracy to violate the drug laws and possession of narcotics with intent to distribute, and

sentencing him to three years imprisonment on each charge; sentence to run concurrently (Carter, J.). Appellant is presently incarcerated.

## STATEMENT OF FACTS

Prior to trial, counsel for co-appellant, Herbert Ricks, informed the Court that by a letter dated November 21, 1975, sent by the government to him, he was, for the first time, informed that the government intended to introduce evidence relating to acts committed in June, 1975, alleged to have been committed in furtherance of the conspiracy (6).* It is not apparent from the record when this letter was received by counsel, but it would seem that it could not have been received before November 22, 1975, two days before trial. Moreover, November 21, 1975 was a Friday, so that the opportunity to act upon the letter was restricted to one week-end. Counsel pointed out to the Court that the motion for a bill of particulars made by counsel for Jewelann Durr, at the time of the motion a co-defendant, requested disclosure of any and all such prior acts alleged to have been committed in furtherance of the conspiracy (7). The government did not so disclose,

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* References are to the minutes of trial.

because, it alleged, this information first came into its possession on Monday or Tuesday, November 17th or 18th, 1975 (8). Further, the government alleged that Mr. Katz was informed of the offer of proof on November 19, 1975 (9) and Mr. Gross on November 18, 1975. Motions by counsel to preclude the proffered proof was denied (10).

THE GOVERNMENT'S CASE

JOHN MILLER testified that in June 1975, he met Jewelann Durr at the office of Harry Robinson (38-39). Miller was at the office first, Robinson called Durr; she came to the office and gave Robinson a tin-foil packet. Robinson gave the packet to Miller who went into a bathroom, opened it and saw a white powder inside (39-40). Miller then asked the price. The price was too high, so Durr made a telephone call, but the party she called was not in. Durr said that she would call back in an hour (42). Miller had been using cocaine for some eight years, and he stated that the white powder was cocaine (43). Miller, Robinson and Durr then went to a restaurant, where Durr made another call. When she returned, she told Miller that the price was $12,500 for eight ounces. Miller felt the price was too high, so he got on the phone to speak to "Herbie" (44). Miller offered to pay $10,000 for the eight ounces.

It was then agreed that later Miller would contact Durr at her office. Miller made the call, and Durr told him that the sale was set for that evening. Miller set the place of the sale at his motel room in Elmsford. Durr gave him a telephone number and told him to call "Herbie". Miller spoke to "Herbie", who agreed to the Elmsford location and it was further agreed that they would meet at 8:00 p.m. (46-48) Miller and a woman went to this motel (Sawmill River Motel). At 10:00 p.m., Miller was in his room, he heard a knock on the door, opened it, and saw Durr and a man introduced as "Herbie" (51). Herbie (appellant Ricks) brought only a small amount of cocaine, he gave Miller a small packet of cocaine for $100 (51-53). Ricks said he would call Miller in a few hours to arrange the conclusion of the sale (53). About two hours later, Ricks called and told Miller he would be over with the cocaine in forty-five minutes (55). About an hour and a half later, Ricks and Durr returned to the motel, delivered eight ounces of cocaine and received $9,900 payment from Miller (56). It was agreed that the next day (June 6) Ricks would return and cut the cocaine for Miller (57). At 3:00 p.m. the next day, Ricks arrived at the motel room and cut the cocaine so that it now filled two twelve ounce bags. Ricks charged Miller $50.00 for the milk sugar and his labor (59).

Miller then went to the airport and flew to Chicago. On June 9, 1975, he was arrested and became an informer for the DEA (60, 87).

On June 10, Miller called Ricks and Durr to say that all was well (60, 61). Two weeks later, Miller again called Ricks and asked for a kilo of cocaine. Ricks said he could get it and a price of $36,000 was agreed upon (60).[1]

On September 18, 1975, Miller spoke to Durr and asked for a pound of cocaine. Durr said she had to speak to her man (62). Miller asked to speak to Ricks and was told to call back the next day. This conversation was taped (62).

On the 19th, Miller spoke to Ricks about getting the pound of cocaine. Ricks said he could get at least eight ounces and possibly more (66).

On Monday, September 22nd, 1975, Miller made a call from DEA headquarters. Miller spoke to Ricks about the purchase of a pound of cocaine by a certain woman (70). A meeting at 83rd and Third Avenue was set for 2:30 p.m. (69-70). At about 2:15 p.m., Miller was picked up by Agents Levine and Dolan. They searched Miller and gave him $10,000 for a "flash roll" (72).

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1 A motion to strike this portion of Miller's testimony on the grounds of insufficient notice was denied (61).

Miller then entered the location agreed upon (Martel's Restaurant). About forty-five minutes later, Durr and Ricks came in and sat at Miller's table (72-73). Miller saw that Dolan, Levine and other agents were surveilling the meeting (73). Miller told Ricks that he wanted a kilo. Ricks said that all he could get was a pound and that he had to speak to his man (74). Miller then inquired about heroin, but Ricks said he only dealt in cocaine (75). A price of $20,000 for the pound was agreed upon; they left the restaurant and Ricks told Miller to call him in one hour (75).

Miller called Ricks from DEA headquarters. Durr answered and told Miller that Ricks was out trying to find his man. She told Miller to call back around 6:00 p.m. At 6:00 p.m., Miller spoke to Ricks on the telephone. Miller told Ricks that the purchaser was pressing him and that they had only until 10:00 p.m. to complete the deal (76). Ricks agreed, and told Miller that he had to go out, meet his man, and pick up the package (77). Miller told Ricks to meet him at the Skyline Motel, room 246 (79-80).

Miller and several agents went to the Skyline, the agents went into an adjoining room. Miller and Agent Campbell, posing as the purchaser, stayed in room 246 (81). At about 9:55 p.m., Ricks and Durr came to

the room. Ricks threw eight ounces of cocaine on the dresser and told Miller that was all he could get. Agent Campbell indicated this was not acceptable. Miller tasted the cocaine (82), and at this point, the other agents rushed into the room and arrested Ricks and Durr (83).

JEWELANN DURR - Testified that she had first met Ricks some two years earlier while working as a waitress (130-131). She first met William Figueroa in 1973 (133). She and Ricks began living together in April, 1974 (135). During the period of time, April 1974 to March 1975, she saw Figueroa several times at her house or his (139). On these occasions, Ricks was always present (139). Ricks and Figueroa would go into another room and she never saw or heard what they did (144).

Durr then testified as to the meeting in June, 1975, at Rovinson's office. Her testimony was essentially the same as Miller's. She knew that she was going to meet Miller and that he, Miller, would want a sample of cocaine. Ricks gave her a sample, which was given to Miller at Robinson's (153-160). It was agreed that Ricks and Durr would meet Miller at the Motel in Tarrytown. Ricks then went out, when he returned, he told her that he had been to speak to "Willie" about the

cocaine (161). They then drove to the motel; afterwards, they drove to Figueroa's house in Brooklyn (166). Ricks made a call from Figueroa's. Then Ricks and Durr, and Figueroa's brother, following in another car, drove to the motel (167-168). After the sale, they drove back to Brooklyn. Ricks gave Durr $400 explaining that he owed "Willie" money for some cocaine, so he, Ricks, had made only $800.00 on the sale (170).

She next heard from Miller some two months later. Miller asked Ricks to come to Las Vegas. (172-173).

On occasions during 1974 and in July 1975, Figueroa left packages of cocaine for Ricks, who left money with Durr to pay Figueroa (175).

She next heard from Miller on September 19, 1975. Miller said he was coming to New York on Monday, and he wanted two pounds of cocaine (178). Miller called the next day and spoke to Ricks (179). On September 22, 1975 Miller called and spoke to Rocks. A meeting at Martel's Restaurant was arranged. Ricks left the apartment and returned at 2:00 p.m. (180-181). They went to Martel's and discussed a sale of cocaine with Miller. Ricks and Durr left Martel's. Ricks told Durr that he had to see Figueroa to find out if he had any cocaine for him. They went to Durr's home, where Ricks made a call. He told her that he was going to

see "Willie" about the cocaine (185). Ricks came back an hour later and told her that they were to meet Figueroa at 9:00 p.m.

At 6:30 p.m., Miller called and spoke to Ricks. Ricks asked Durr for pencil and paper and wrote down a telephone and room number at the Skyline Inn, for a 10:00 p.m. meeting (186). At 9:00 p.m., Ricks and Durr drove to Figueroa's mother's house. Ricks got out of the car. Figueroa's brother came over and spoke to Durr, who told him Ricks had already left the car (188). Durr then went into the house, where she saw Figueroa give Ricks two plastic bags of cocaine (189). Ricks and Durr got into their car. Ricks gave Durr the two plastic bags, which she put into her handbag (189). William Figueroa then pulled up and they followed him [illegible] ne city. As they were driving, Ricks gave her some cutting material and told her to cut the cocaine (189-190). The cocaine she took out of the bags, was placed in a pouch and put under the armrest of the car (192-193). They drove to the Skyline and went up to Miller's room, where the sale was consummated and all the participants were arrested (193-194).

AGENT MICHAEL LEVINE, on the day of the arrest, questioned Ricks and Durr at headquarters. Durr told him that the cocaine had come from William Figueroa (252-253).

AGENT JAY SILVESTRO surveilled the meeting at Martel's and followed Ricks and Durr to Rockaway Boulevard. Later he surveilled the sale at the Skyline. He saw Figueroa sitting in his car. When the arrest in the room was made, he was ordered to arrest the man in the green car (275).

AGENT EMILIO GARCIA was with Agent Silvestro. After the arrests, he removed an ounce of cocaine in a pouch from Rick's car (282). Garcia spoke to Figueroa after the arrest, and was told that he, Figueroa, was in the area because he was on his way to Victor's Cafe to eat, after he had closed up the family business (289).

THE DEFENDANT'S CASE

WILLIAM FIGUEROA testified in his own behalf. He stated that he had never delivered any packages or parcels to 717 Rockaway Parkway, and never left anything for Durr at the address, nor did he ever get any money from Durr (324).

He did not go to a motel in Elmsford in June 1975 (325).

On September 22, 1975, between 9:00 and 10:00 p.m. he wasn't at his mother's, he was at the family grocery store, working (325). He never delivered anything to Ricks or Durr on that day (325). After closing the

grocery store on the 22nd, he drove to Victor's Cafe to get something to eat (351-353). He did know Ricks from the neighborhood, but neither was ever in the other's home (327). He did speak to Ricks on the telephone (327). He had never met Durr (328).

## ARGUMENT

### POINT I

### THE INTRODUCTION OF THE TESTIMONY ABOUT THE JUNE, 1975 TRANSACTION DENIED APPELLANT A FAIR TRIAL

While the record is not clear, it appears that, at the earliest, one week prior to trial counsel for Ricks was generally informed that the government intended to offer proof of certain June 1975 transactions. No specifics were given, except that the events took place in June, 1975.

By a letter dated November 21, 1975, the specifics were given. Thus, Figueroa's attorney had, at best, three days (probably less) over a weekend to prepare for a whole new series of alleged overt acts. This was far too short a time to adequately investigate and prepare for trial.[1]

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1. It must be pointed out, that certain tapes made of the calls made by Miller to Durr and Ricks in July were thrust upon appellants at the opening of trial. The court made it quite clear that no matter what, the trial was to begin immediately. This explains the absence of a request for more time to prepare on the June transaction (6). Also, the prosecution stated that it had no knowledge of the June transaction until the middle of November. However, the testimony of agent Levine shows that Burr had mentioned this transaction to him on the date of arrest, Sept. 22, 1975.

> The question of admissibility of the 1970 offense requires the trial judge to balance all the relevant considerations that might bear on the competing factors of probative value against undue prejudice. United States v. Bradwell, 388 F.2d 619, 620-622 (2d Cir., 1968); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967). The balance was found in favor of the needs of the government to prove guilty knowledge at the risk of prejudice to the accused.
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> While this ruling was a proper exercise of the district court's discretion, cf. United States v. Bradwell, supra, 388 F. 2d at 622, the effect of the evidence was such as to require the defense be given fair opportunity to meet it. The government offer, as far as the defense was concerned, was made in the dark.
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> Confronted for the first time with the accusation of prior criminal conduct and the identity of the accuser, the defendant had little or no opportunity to meet the impact of this attack in the midst of trial. This precarious predicament was precipitated by the prosecutor. United States v. Baum 482 F.2d 1325, 1331 (2d Cir. 1973).

The Court in Baum went on to hold that Baum had not had a fair opportunity to meet this proof of an offense not presented against him in the indictment. 482 F.2d at 1332.

While Baum is partly distinguishable, its reasoning applies with equal force here. Disclosure, rather than suppression, does usually promote justice. See, United States v. James, 495 F.2d 434 (5th Cir., 1974); United States v. Miller, 411 F.2d 825, 832 (2d

Cir., 1969); cf. United States v. Padrone, 406 F.2d 560, 561 (2d Cir., 1969).

Appellant asserts that:

> The course of conduct of the government smacks too much of a trial by ambush, in violation of the spirit of the rules. United States v. Kelly, 420 F.2d 26 (2d Cir., 1969).

In Kelly, appellant was granted a new trial despite a strong government case. Moreover, Kelly, clearly stands for the proposition that the disclosure must be in time to permit appropriate preparation by the defense. Id. at 29-30.

The case law indicates that a reversal, for the type of conduct engaged in by the government here, is only warranted when there is a showing that there was substantial prejudice to the accused. United States v. James, supra, at 436; United States v. Saitta, 443 F.2d 830, 831 (5th Cir., 1971), cert. den. 404 U.S. 938; United States v. Dowdy, 455 F.2d 1253, 1255 (10th Cir., 1972); United States v. Cole, 453 F. 2d 902, 904 (8th Cir., 1972); United States v. Allsenberrie, 424 F.2d 1209, 1215 (7th Cir., 1970).

Such prejudice is present here. It must be remembered that, as to Figueroa, it is the testimony of Durr, upon which the conviction rests. Despite surveillance and tapes, Figueroa's actions are colored

as culpable only by rr's testimony. The June transaction, which was stressed as the beginning of the Miller conspiracy, was another opportunity for Miller and Durr to reinforce each other's testimony. Figueroa not being referred to during the June transactions, counsel's cross-examination was limited. With adequate time to permit proper investigation (i.e. calling or interviewing Mr. Robinson), Durr's testimony as to the June events could have been more seriously attacked. Moreover, the June transaction was the springboard for Durr's testimony about Figueroa's leaving packages with her and getting money in return during 1974 and 1975. To have permitted evidence of the June transactions, without granting proper time to prepare was reversible error.

Counsel for Ricks strenuously objected to the government's actions. It is not clear whether counsel for Figueroa joined. Since the reason for objections is to point out possible errors to the Court, which was done by co-counsel, Figueroa should be deemed to have joined in the objection.

In light of the Court's statement on the tapes of the July phone calls, it was clear that the trial was going to begin no matter what. Thus, the failure to request an adjournment was both understandable and excusable.

In any event, it is appellant's position that this error was plain under Rule 52(b) of the Federal Rules of Criminal Procedure, and further, that the case against Figueroa being based substantially on one witness, Durr, is not a case of overwhelming proof of guilt, such as to render the error harmless. cf. Chapman v. California, 386 U.S. 18 (1967); United States v. Kelly, 420 F. 2d 26 (2d Cir., 1969).

## POINT II

### THE ADMISSION INTO EVIDENCE OF THE POST-ARREST STATEMENTS OF DURR WHICH INCULPATED APPELLANT WAS REVERSIBLE ERROR

Agent Michael Levine testified that on the evening of September 22, 1975, he was the group supervisor of the group of agents investigating the transactions at the Skyline Motel (250). He was stationed in a room which adjoined the room in which the sale occurred. After the sale, he arrested Ricks and Durr, and took them to Drug Enforcement Administration headquarters (251). At headquarters, Levine advised Durr of her Miranda rights, and then questioned her (252). He asked her if she knew who the third person arrested with her was. She said that the person was "Willie". Levine then asked from where the cocaine had come and she told him that it "came from Willie". She also told

Levine that she had taken part in a prior narcotics transaction where Ricks had gotten cocaine from Figueroa and had delivered the cocaine to Miller at a Westchester motel (252-253).

No limitation on the use of this testimony was made by the government or the Court. Defense counsel did not object.

It is clear that the hearsay-conspiracy exception to the hearsay rule applies only to declarations made while the conspiracy charged was still in progress. Anderson v. United States, 417 U.S. 211 (1974); Lutwak v. United States, 344 U.S. 604 (1953); United States v. DeCicco, 435 F.2d 478 (2d Cir., 1970); see also Krulewitch v. United States, 336 U.S. 440 (1949).

> The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has "scrupulously observed." Anderson v. United States, supra at 418.
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> The rationale for both the conspiracy-hearsay exception and its limitations is the notion that conspirators are partners in crime. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 . . . (1940); Fiswich v. United States, 329 U.S. 211, 216 . . . (1946). As such, the law deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declarations of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against

his partner. See Krulewitch v. United States, 336 U.S. 440, 442-443 ... (1949); Fiswich v. United States, supra, at 217; Wong Sun v. United States, 371 U.S. 471, 490 . . . (1963). See generally 4 J. Wigmore, Evidence Sections 1077-1079 (Chadbourne rev. 1972). Anderson v. United States, supra, at 218 n. 6 (unofficial citations omitted).

Here it is clear, that the conspiracy had ended. All the alleged perpetrators were either working for the government (Miller) or were under arrest. Thus, Durr's prior statements were not admissible on the theory that they fell under the co-conspirator exception.

It is true, that where the proferred evidence is not used to prove the truth of the statement, it is not hearsay. See Dutton v. Evans, 400 U.S. 74 (1970) (opinion of Stewart, J.)

In this case, the government did not specify for what purpose these statements were being offered. It can be hypothesized that they were offered to rebut a claim of recent fabrication, and therefore, were not used for any purpose other than to show a prior consistent statement made before Durr had made her arrangements with the government. This record does not support this ground. First, the government introduced these statements without any limitation, nor did the court sufficiently instruct the jury that their use was limited

in any way.[2] Thus, this evidence was admitted for the purpose of proving the truth of the statements. Second, at the time of this testimony, Durr had already testified. She was cross-examined about her understanding and expectations about her testimony, and she was asked if her motivation to testify was to obtain favorable consideration (228). This was hardly an attack on her story as a recent fabrication. Moreover, merely asking a witness if they would lie to avoid going to jail should not in and of itself justify the use of the witnesses' prior consistent statements.[3]

The government stressed this prior consistent statement in its summation (422) thereby heightening the prejudice to Figueroa. This was improper bolstering of Durr's testimony.

Given the crucial nature of Durr's testimony, namely that she was the sole witness able to color

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2. The Court did charge on the use permitted of prior inconsistent statements. Also, the Court charged the jury that statements made after the conspiracy were to be considered only as against the person who made them (448). However, the Court did not refer specifically to Durr's statement, nor did it tell or construct the jury as to when the conspiracy here terminated.

3. Durr testified at trial that the cocaine in question, as well as on prior occasions, had come from Figueroa. This apparently obviates any Bruton problems. Bruton v. United States, 391 U.S. 123 (1968) (the declarant was not a witness at trial); cf. Anderson v. United States, supra, at 220.

Figueroa's actions as culpable, the error in admitting her prior statements cannot be deemed harmless. cf. Chapman v. California.

For the same reason, the failure to object or request specific limiting instructions[4] should not prevent this Court from determining if there was error, and the effect of that error. See, Rule 52(b) Federal Rules of Criminal Procedure.

## POINT III

APPELLANT, PURSUANT TO RULE 28(I) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, INCORPORATES BY REFERENCE ALL RELEVANT ARGUMENTS RAISED BY CO-APPELLANT RICKS.

## CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND APPELLANT GRANTED A NEW TRIAL

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant

J. JEFFREY WEISENFELD
On the Brief

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4. Which may have been of little value in any event. See Bruton v. United States, 391 U.S. 123, 126 (1968), rejecting the premise of Delli Paoli v. United States 352 U.S. 232, that such instructions are sufficiently effective.

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 8 day of March , 19 76 at No. 1 St. Andrews Pl. NYC deponent served the within Brief upon : U.S. Atty., So. Dist. of N.Y. 3 the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 8 day of March 19 76

.....
Edward Bailey

.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0152945
Qualified in Richmond County
Commission Expires March 30, 1976